STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 21, 2010
v KENNETH VANWAYNE CLARK, Defendant-Appellant.	No. 281460 Wayne Circuit Court LC No. 07-008315-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v KENNETH VANWAYNE CLARK, Defendant-Appellant.	No. 281461 Wayne Circuit Court LC No. 07-008316-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v KENNETH VANWAYNE CLARK, Defendant-Appellant.	No. 281462 Wayne Circuit Court LC No. 07-008317-01

Before: MURRAY, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Defendant was charged with multiple offenses in three separate cases that were consolidated for trial. In LC No. 07-008315-01, he was convicted of obstructing a police officer, MCL 750.81d. In LC No. 07-008316-01, he was convicted of three counts of assault with intent

to commit murder, MCL 750.83, and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Lastly, in LC No. 07-008317-01 he was convicted of first-degree premeditated murder, MCL 750.316(1)(a), discharge of a weapon from a vehicle, MCL 750.234a, and felony-firearm, MCL 750.227b. He was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent terms of life in prison for the murder conviction, 25 to 50 years for each assault conviction, and one to four years for the discharge of a firearm conviction, to be served consecutive to four concurrent two-year terms of imprisonment for the felony-firearm convictions.[1] Defendant appeals as of right in each case. We have consolidated these appeals for our consideration and we affirm.

I. BASIC FACTS

Defendant's convictions arise from a shooting spree on the morning of March 13, 2007. At trial, witnesses testified that they observed a green van stop beside a gray van that was parked outside a parole office in Detroit. The driver of the green van fired a rifle or long gun into the gray van. An occupant of the gray van, Pancho Lawrence, was killed. As the green van drove away, Mark Hoffert, who was waiting inside a vehicle that was parked in front of the gray van, followed the green van and called 911 while in pursuit. Hoffert testified that he followed the van onto a street where it stopped and the driver got out, turned toward Hoffert, and began firing. Hoffert was able to see the shooter's entire body and identified the shooter as defendant. Defendant got back in the green van and again drove off, and Hoffert continued to pursue him. The back window of defendant's vehicle was shot out, and Hoffert was able to see defendant as he fired more shots at Hoffert while driving. Hoffert continued following defendant as he drove through neighborhoods in Hamtramck and Detroit. After turning onto a residential street, defendant stopped his vehicle and Hoffert passed him as defendant again attempted to shoot at Hoffert with a rifle. Hoffert drove behind a building, but then spotted defendant on Healy Street and alerted a 911 dispatcher. The police arrived and several officers participated in a foot chase and pursuit of defendant, during which defendant was shot in the shoulder. Defendant was eventually arrested after the police found him hiding under a porch.

II. THE PROSECUTOR'S CONDUCT

Defendant first argues that the prosecutor made improper comments that denied defendant a fair trial. We disagree. Because defendant did not object to the prosecutor's conduct at trial, we review his claims of misconduct for plain error affecting defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). This Court evaluates claims of prosecutorial misconduct on a case-by-case basis, examining the pertinent portion of the record and evaluating the prosecutor's remarks in context. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *Id.*

[1] Defendant received a suspended sentence of one year for the obstruction of a police officer conviction.

It is true, as defendant notes, that a prosecutor may not personally attack defense counsel. See *People v Phillips*, 217 Mich App 489, 498; 552 NW2d 487 (1996). Nonetheless, an otherwise improper remark may not be an error requiring reversal where the prosecutor is merely responding to defense arguments. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Further, a prosecutor may not comment on a defendant's failure to present evidence, or attempt to shift the burden of proof. *People v Reid*, 233 Mich App 457, 477-478; 592 NW2d 767 (1999). However, a prosecutor's comment on a defendant's theory of the case does not shift the burden of proof. *Id*. at 478.

Here, defendant challenges the prosecutor's remarks made during rebuttal argument in which the prosecutor compared defense counsel's argument to an octopus squirting ink, and referred to the arguments as "red herrings" and "outrageous." Defendant contends that these remarks improperly denigrated the defense by suggesting that defense counsel was deliberately trying to mislead the jury. However, the complained of comments, when viewed in context, were made in response to defense counsel's attempts during closing argument to discredit the reliability of Hoffert's identification testimony and aspects of the police investigation. The prosecutor did not attack defense counsel personally, but highlighted the weaknesses in the defense arguments and stated that the arguments were "red herrings" and "octopus ink" when considered in light of the entire case. Considering the responsive nature of the remarks, they were not improper. See *Kennebrew*, 220 Mich App at 608.

We also disagree with defendant's argument that the prosecutor improperly shifted the burden of proof by stating that defendant could have called Darryl Ford, Travante Norris, and Lawrence Guyden as witnesses if he thought they had information to offer. The challenged remark was made in direct response to defense counsel's closing argument in which counsel criticized and questioned the prosecutor's motive for not calling the aforementioned witnesses. Thus, when viewed in context, the prosecutor was merely remarking, in response, that although defendant did not have the burden of proof, he could have subpoenaed the witnesses if he wanted to. See *id*. Considering the responsive nature of the prosecutor's remark and the prosecutor's acknowledgment that defendant did not have the burden of proof, there was no plain error.

Lastly, because none of the prosecutor's remarks were improper, we also reject defendant's argument that defense counsel was ineffective for failing to object to the remarks. Counsel is not required to make a futile objection. See *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002). Defendant is not entitled to relief on the basis of the prosecutor's conduct.

III. HOFFERT'S IDENTIFICATION TESTIMONY

Defendant next argues that the trial court erred by denying his pretrial motion to suppress Hoffert's identification of defendant. Specifically, he contends that Hoffert's identification of him was tainted by an impermissibly suggestive confrontation at the preliminary examination. We cannot agree. We review for clear error a trial court's decision to admit an in-court identification. *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998).

"'The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification.'" *People v Murphy (On Remand)*, 282 Mich App

571, 584; 766 NW2d 303 (2009) (citation omitted). "If a witness is exposed to an impermissibly suggestive pretrial identification procedure, the witness'[s] in-court identification will not be allowed unless the prosecution shows by clear and convincing evidence that the in-court identification will be based on a sufficiently independent basis to purge the taint of the illegal identification." *Colon*, 233 Mich App at 304. Relevant factors for examining the totality of the circumstances include the witness's opportunity to view the perpetrator at the time of the crime, the witness's degree of attention, the accuracy of a prior description, the witness's level of certainty at the pretrial identification procedure, and the length of time between the crime and the confrontation. *Id.* at 304-305.

In this case, even assuming that defendant's confrontation at the preliminary examination was suggestive, the record clearly establishes that Hoffert had a sufficient basis to identify defendant independent of defendant's appearance at the preliminary examination. Hoffert first observed the shooter's profile during the shooting outside the parole office, and then had several additional opportunities to observe the shooter during the ensuing car chase. Hoffert testified that he was able to see the shooter during the car chase because the back window of the shooter's van had been shot out, and also when the shooter got out of the van to shoot at Hoffert. Hoffert had no doubt that defendant was the shooter. Considering the multiple opportunities that Hoffert had to view the suspect during daylight hours and the level of certainty in Hoffert's identification, the trial court did not clearly err by admitting Hoffert's identification testimony.

IV. FAILURE TO PRODUCE WITNESSES

Defendant also contends that a new trial is required because the prosecutor failed to produce three endorsed witnesses at trial, because the trial court denied his request for a missing witness instruction, and because counsel was ineffective for failing to object. We disagree. Because defendant did not object to the prosecutor's failure to produce the witnesses, or request a due diligence hearing, this issue is not preserved. Accordingly, defendant has the burden of establishing a plain error (i.e., one that is clear or obvious) that affected his substantial rights (i.e., was prejudicial). *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Under MCL 767.40a, the prosecution is not required to produce all known witnesses for trial, but has "an obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request." *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003) (quotation marks and citation omitted). In addition, the prosecution has a duty to provide the defense with a list of the witnesses the prosecuting attorney intends to produce at trial. MCL 767.40a(3); *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000). If a witness is named on the prosecution's witness list under MCL 767.40a(3), the prosecutor has a duty to produce that witness for trial, unless relieved of that duty for good cause. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). "The inability of the prosecution to locate a witness listed on the prosecution's witness list after the exercise of due diligence constitutes good cause to strike the witness from the list." *Canales*, 243 Mich App at 577.

In this case, Ford, Guyden, and Norris were each listed on the prosecution's witness list. Therefore, the prosecutor was required to produce them, unless relieved of that obligation for good cause. However, because defendant did not object to the nonproduction of the witnesses or request a due diligence hearing, the reasons for the witnesses' nonproduction are not apparent from the record. Thus, defendant has not established plain error because there is no basis for

finding a plain error, i.e., that good cause was lacking or that diligence efforts were not made to attempt to produce the witnesses for trial. Moreover, defendant has not shown that he was prejudiced by the prosecution's failure to produce the witnesses. Although Guyden and Norris were both present inside the van in which Lawrence was fatally shot, Guyden testified at the preliminary examination that he did not see the shooter. The record does not indicate whether Norris saw the shooter or what information he could have provided. Defendant's identity as the shooter was independently established by the testimony of other witnesses who described the shooter and the shooter's vehicle, Hoffert's identification testimony, and physical evidence linking defendant to the van that was linked to the parole office shooting. Further, neither Guyden nor Norris could have provided information relating to the charges in the cases involving Hoffert and the police officers, and the failure to produce Guyden and Norris at trial led to the trial court's dismissal of the charges relating to those two witnesses in the parole office case. With respect to Ford, the available evidence indicates that he was investigated as a possible suspect because of his presence inside a house near where defendant was observed while being pursued by the police, but police later determined that Ford was not involved. Evidence of the police's investigation of Ford and their reasons for releasing him was presented to the jury. No other evidence was presented linking Ford to any of the offenses or suggesting that he had information about any of the offenses. Accordingly, no basis exists for concluding that defendant was prejudiced by the absence of these witnesses.

Similarly, we reject defendant's related, and unpreserved, argument that counsel was ineffective for failing to request a due diligence hearing in regard to the missing witnesses. We have already concluded that defendant was not prejudiced by the witnesses' absence, and, accordingly, defendant also cannot established that he was prejudiced by counsel's failure to request a due diligence hearing. Moreover, defendant has not overcome the presumption that counsel's decision not to request a due diligence hearing was a matter of sound trial strategy. There is no indication that any of the witnesses could have provided information helpful to defendant's case. Further, the failure to produce Guyden and Norris led to the dismissal of the charges relating to those two witnesses in the parole office shooting case, and the absence of Ford contributed to defense counsel's ability to attack the integrity of the police investigation. Counsel may have reasonably concluded that these witnesses' absences were more helpful than harmful. For these reasons, defendant has not established that defense counsel was ineffective.

And, finally, because defense counsel did not request the due diligence hearing, we cannot conclude that the trial court abused its discretion by denying defense counsel's request for a missing witness instruction. *Perez*, 469 Mich App at 420. Defendant is not entitled to a new trial on the basis of the prosecutor's failure to produce these three endorsed witnesses.

V. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises several issues in a pro per supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which require reversal.

A. TRIAL COURT'S JURISDICTION

Defendant first suggests that the lower courts lacked jurisdiction over him due to an invalid arrest warrant. Defendant has not established either factual or legal support for this claim. Regardless, it is an established principle of law that an invalid arrest does not oust a court

of jurisdiction. See *People v Spencley*, 197 Mich App 505, 508; 495 NW2d 824 (1992). Accordingly, there is no merit to this issue.

B. BOST'S IDENTIFICATION TESTIMONY

Defendant also challenges the identification testimony of witness Patrick Bost at trial, arguing that it was unduly suggestive. Defendant did not move to suppress Bost's in-court identification before trial, or object to his identification testimony at trial. Accordingly, this issue is not preserved and our review is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763. As previously stated, "If a witness is exposed to an impermissibly suggestive pretrial identification procedure, the witness' in-court identification will not be allowed unless the prosecution shows by clear and convincing evidence that the in-court identification will be based on a sufficiently independent basis to purge the taint of the illegal identification." *Colon*, 233 Mich App at 304. In this case, however, defendant does not contend that Bost was exposed to a pretrial identification procedure of any kind, let alone one that was unduly suggestive. Instead, his claim is based solely on the allegedly suggestive nature of the confrontation at trial. But because Bost's identification at trial was not the product of an impermissibly suggestive pretrial procedure, there was no pretrial taint that required the establishment of an independent basis for the in-court identification. Thus, defendant has not established plain error.

C. DISCOVERY

Defendant next argues that reversal is required because of numerous alleged discovery violations. We disagree. We review for an abuse of discretion a trial court's decision regarding the appropriate remedy for a discovery violation. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003).

Although defendant complains that the prosecutor failed to disclose the addresses of several witnesses, MCR 6.201(A)(1) permitted the prosecutor to make the witnesses available for interviews in lieu of providing the witnesses' addresses. The record discloses that the prosecutor offered to make the witnesses available, but defendant declined to take advantage of that offer. Accordingly, there was no discovery violation with respect to the disclosure of witnesses.

Defendant further asserts that failure to disclose the search warrant violated his constitutional due process rights. MCR 6.201(B)(4) provides that a prosecutor, upon request, must provide "any affidavit, warrant, and return pertaining to a search or seizure in connection with the case." A defendant has a constitutional due process right to the production of evidence that is favorable to him and that is in the possession of the prosecution, regardless of whether the defendant requests the evidence. *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963); *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). "[T]o establish a Brady violation, a defendant must prove (1) that the state possessed evidence favorable to the defendant, (2) that the defendant did not possess the evidence and could not have obtained it with the exercise of reasonable diligence, (3) that the prosecution suppressed the favorable evidence, and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *People v Fox*, 232 Mich App 541, 549; 591 NW2d 384 (1998).

Here, the record discloses that the search warrant for 4802 Delta was suppressed when it was issued, but that defendant was provided with a copy of the search warrant affidavit. For reasons unclear on the record, the search warrant was never produced prior to trial. Defendant suggests that the search warrant for the house on Delta contained exculpatory information, but provides no support for this contention. The reasons for requesting the warrant were contained in the search warrant affidavit, a copy of which was provided to defendant. Further, defendant presented evidence at trial that the police continued their search of the neighborhood to search for another suspect after defendant's arrest. Thus, defendant has not established a reasonable probability that the outcome of the proceedings would have been different had the search warrant been produced before trial. Accordingly, there was no *Brady* violation. Moreover, to the extent that the failure to produce the search warrant violated MCR 6.201(B)(4), this nonconstitutional error was harmless for the same reason, i.e., any error was not outcome determinative. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Therefore, assuming any error occurred, it does not require reversal.

We also reject defendant's related argument that defense counsel was ineffective for failing to move for a continuance for a hearing on the alleged discovery violations. Because the prosecutor complied with her duty relative to the disclosure of witnesses by offering to make the witnesses available to defense counsel for interviews, and because defendant has not established any prejudice relating to the failure to disclose the search warrant, defendant's ineffective assistance of counsel claim cannot succeed.

D. FAILURE TO PRODUCE WITNESSES

Defendant again challenges the prosecutor's failure to produce witnesses Norris, Guyden, and Ford at trial, and additionally challenges the failure to produce two other witnesses, Jennifer Rigley and Maureen Kelly. In his view, the prosecutor's failure to produce these witnesses deprived him of a substantial defense. We disagree. As previously discussed in section IV *supra*, defendant has not established any basis for relief with respect to the failure to produce witnesses Norris, Guyden, and Ford.

The same analysis applies to witnesses Rigley and Kelly. Because defendant did not object to the failure to produce these witnesses or request a due diligence hearing, and the reasons for the witnesses' nonproduction are not otherwise apparent from the record, defendant has not established a plain error related to their nonproduction. Further, according to an investigator's report, Kelly and Rigley were both present in the parking lot of the parole office building when the shooting took place. They both heard gunshots and saw the driver of a van fire a long gun into the complainants' van. There is no indication that either witness was able to identify the shooter. Because other witnesses had provided similar information, and there is no indication that either Kelly or Rigley could have provided information favorable to defendant's case, defendant has not shown that the failure to produce these witnesses affected his substantial rights.

Defendant also argues that defense counsel was ineffective for failing to request a due diligence hearing, but as explained in section IV, *supra*, there is no basis for finding that defendant was prejudiced by the absence of these witnesses and, thus, an ineffective assistance of counsel claim cannot succeed. Further, because defendant was not denied the right to call these

witnesses and he did not object to the nonproduction of the witnesses, his argument that he was denied his right to present a defense lacks merit. Defendant is not entitled to relief on this basis.

E. DEFENDANT'S ARREST AND IDENTIFICATION TESTIMONY

We also reject defendant's argument that there was no probable cause for his arrest. "Probable cause to arrest exists if the facts available to the officer at the moment of arrest would justify a fair-minded person of average intelligence to believe that the suspected person has committed a felony." *People v Thomas*, 191 Mich App 576, 579; 478 NW2d 712 (1991). Here, an officer spotted defendant holding a gun in the neighborhood where Hoffert had followed him after the parole office shooting. The officer found an automatic rifle and other weapons at the spot where defendant had been standing. These facts provided probable cause to believe that defendant was the shooter from the parole office.

Further, there is no legal or factual basis for defendant's arguments that the witness identifications were the fruit of his arrest. Neither Hoffert nor Bost identified defendant at the time of his arrest, so their in-court identifications cannot be characterized as identifications made incident to an arrest. In addition, Hoffert had an independent basis to identify defendant and Bost was not subject to a pretrial identification procedure. Because there is no merit to defendant's arguments, defendant's related ineffective assistance of counsel claim also cannot succeed.

F. CUMULATIVE EFFECT OF SEVERAL ERRORS

Lastly, defendant's failure to establish a combination of several individual errors that operated to deny him a fair trial precludes relief under a cumulative error theory. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001).

Affirmed.

/s/ Christopher M. Murray
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio